UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA (Asheville)

No. 1:20-CV-00066-WGY

CARYN DEVINS STRICKLAND, formerly known as Jane Roe,
Plaintiff

vs.

UNITED STATES OF AMERICA, et al,
Defendants

FILED
ASHEVILLE DIVISION
Dec 07 2022
U.S. District Court
Western District of N.C.

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For Hearing Before:
Judge William G. Young

Partial Summary Judgment

United States District Court
District of Massachusetts (Boston)
One Courthouse Way
Boston, Massachusetts 02210
Monday, October 31, 2022

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P R O C E E D I N G S

(Begins, 3:00 p.m.)

THE CLERK: Civil Matter 20-00066, Strickland versus the United States of America.

THE COURT: Good afternoon counsel. This is a hearing to entertain a motion for partial summary judgment and a motion addressed to scheduling. We're holding it on our zoom platform. Our host for the, um, zoom proceeding is Courtroom Deputy Clerk, Jennifer Gaudet. The -- excuse me. The matter is taken down by our Official Court Reporter, Rich Romanow. The proceeding is -- and I have law clerks on the line.

The proceeding is open to the press and to the public. I should say if any members of the public are present, you must keep your microphones muted and that the rules of court remain in full force and effect, that is to say there is no taping, streaming, rebroadcast, or other transcription of these proceedings.

With that done, would counsel identify themselves and who they represent starting with the plaintiff.

MR. ANDONIAN: Good afternoon, your Honor, Phil Andonian on behalf of Caryn Strickland.

THE COURT: Good afternoon. And for the defense?

MR. KOLSKY: Good afternoon, your Honor, Joshua Kolsky on behalf of the defendants.

THE COURT: And good afternoon, Mr. Kolsky.

All right. We'll entertain the motion for partial summary judgment first. There are -- and each side will have 15 minutes to argue. It's my duty to say, as the rules say, but I think it's always helpful to point it out, that making a motion for summary judgment has at least the theoretic possibility of having summary judgment taken against the moving party on the appropriate principles.

You understand that, Mr. Andonian?

MR. ANDONIAN: I'm sorry, yes, your Honor. I should note, I'm sorry, in the introduction, that Ms. Strickland is here as well, she's actually going to be arguing the summary judgment portion.

THE COURT: Has she filed an appearance?

MS. STRICKLAND: Your Honor, we didn't know if that would be required, but we are prepared to file one immediately.

THE COURT: Well it is required.

MS. STRICKLAND: Okay.

THE COURT: I recognize that you are an attorney, of course, and, um, you have a right to appear. It's not customary to have the client appear as well. But as you're an attorney, you have a right to file an appearance and I understand you are filing an

appearance, is that correct?

MS. STRICKLAND: Yes, your Honor, we will be filing an appearance immediately. And I would just say as well, the reason why I'm here is Jeannie Suk Gersen was supposed to be arguing the summary judgment motion today, but she's not available, and because the Court has said no further continuances, I'm prepared to argue the motion and I'm glad to be here today.

THE COURT: Well I'm happy to have you. I'm happy to have Ms. Gersen. But the Court has to schedule things to stay on top of its work. I will hear you.

Well then let me address you, because that's what -- um, Mr. Kolsky, because we're going to start with the motion for partial summary judgment. And, um, in two respects I can make rulings and I don't need oral argument. The first is the defendant's motion to dismiss.

Mr. Kolsky, the motion to dismiss is denied, that doesn't mean the defense of sovereign immunity is gone, but it's denied as a procedural matter. We're long beyond the motion to dismiss stage. There was a motion to dismiss. I granted it. There was an appeal. I was affirmed in part and reversed in part. So I'm not entertaining any other motions to dismiss. If we get to a remedies stage, then that issue of sovereign immunity

is open to the government and I will entertain it.

The other respect that I can --

MR. KOLSKY: Thank you, your Honor.

THE COURT: -- knock off is a point that the government raises in its brief.

Ms. Strickland, you did not make argument as to certain of the government actors and as to those identified in your original complaint as actors, the motion for partial summary judgment is denied. That's -- it's a matter of little moment because of course if you succeed against the government actors in any respect, you've succeeded.

But give me a moment though, and I'm going to give you your full 15 minutes to argue, to say a word about my review of the papers here.

First, Cooper Strickland is not here today, but I would say thank you to him. I have been eager and remain eager to get this case to a trial. But his insistence that we hear the motion for partial summary judgment, um, has actually served the Court well in that it is required a very careful look at the evidentiary record and those things which actually constitute evidence, and, um, I've made no conclusions, but I want you to know what my reaction is.

I went into this thinking that well probably it's

not disputed that Ms. Strickland suffered some improper harassment in the workplace. In fact that's disputed, it's significantly disputed. And in a case in this posture, that's something on which the government bears the burden of proof, because the focus here is not on whether she suffered improper harassment, but what the government actors did about it. And so I thought, "Well you know where they bear the burden of proof, they'd better have come forward with evidence," and they have. So I, at least, I'm sitting here thinking that's disputed. And the second thing I thought was "Well probably there's no dispute that she made complaints about it," and I find that's disputed. So, um, it's difficult to see how I'm going to go forward.

And then I come to the third point, which I expected to be disputed and which is the actual core of the case, "Was the government's response adequate under the law, under the Constitution and the law?" And that's disputed.

So I -- I have to say I'm meeting with you thinking -- my mind is completely open as to an evaluation of the evidence, and I recognize that this is a judge-tried case, but this is a motion for summary judgment, all I can do is make rulings, and I don't see how on this record I'm going to be able to make any

ruling of law.

There is one thing, and I just throw this out to you and then I do want to hear your argument.

It would appear undisputed that whatever the harassment -- let's say egregious harassment was proved, let's just assume that, if that were so it appears that under the system that the government has here, as to remedy there's no binding authority. The Human Resources people, all they can do is make like recommendations, that wouldn't be sufficient if we were dealing with a private corporation. Now recognizing that the Article 3 judicial officers themselves, that may be a little more dicey, but it's possible that that issue, um, might be isolated and determined on a case-stated basis. But I tell you that I am, um, open to these arguments, but I come thinking that I have genuine issues of material fact.

Ms. Strickland, I'll hear you.

MS. STRICKLAND: Thank you, your Honor. You have made several points so I'd like to go through each of them in turn and then I have my own statement about the claims and then I'd be happy to answer your questions. But there were --

THE COURT: You have 15 minutes. Go ahead.

MS. STRICKLAND: Yeah, thank you, your Honor.

The first thing you mentioned is the possibility of putting a party on notice that summary judgment could be granted in favor of the non-moving party. We would object to that and because there has to be notice and an opportunity to respond, and we would also request the opportunity to file our own Rule 56 affidavit setting out the areas where we would need discovery before any --

THE COURT: I consider that highly unlikely here so I wouldn't worry about that. Don't, um -- I always give notice, that's the notice. But I wouldn't spend your time on that.

Go ahead.

MS. STRICKLAND: Okay, thank you, your Honor.

The next issue that you mentioned is the remedies phase and the issue of sovereign immunity. Our understanding of the Fourth Circuit decision in ***Dadenback*** is that they settled that issue and they said that front pay in lieu of reinstatement is not barred by sovereign immunity. So I just wanted to make clear that in fact I do not think the issue of sovereign immunity is on the table at this point because we are not seeking back pay, that has been foreclosed by the --

THE COURT: No, I understand that. I have to say I'm not clear that that is a holding of the Fourth

Circuit, but you say it is, and I guess that's a matter that -- of course I'm bound by the Fourth Circuit and the mandate rule and I embrace it. I have no problem with that. That's not to be argued now.

Remedy. Go ahead.

MS. STRICKLAND: Yes, your Honor.

A third point that you raised, and I want to make sure I understand it because it sounds like what you are discussing is a possible facial challenge under the EDR plan and the possibility of authority to order remedies. That was initially raised in our summary judgment motion. But our understanding is that the facial claim under the EDR plan was foreclosed by the Fourth Circuit's decision because the Fourth Circuit held that adequate remedies do exist facially under the EDR plan.

THE COURT: Thank you.

MS. STRICKLAND: Yes. And so what we're here to discuss now and what I would like to turn to are the as-applied challenges to the EDR plan. And, um, in particular you mentioned issues about whether there are disputes of fact about the harassment and issues like that, and I'll turn to that in a moment, but first I think it's important to understand that the facts supporting the due process claim, there are no genuine disputes of material fact here on the due process claim.

The Fourth Circuit held that due process was violated if defendants refused to disqualify the Defender from the EDR investigation and led plaintiffs to believe he was the decision-maker. That showing is not here based on defendant's own sworn declaration. Their declaration confirms that the Defender was not disqualified from the EDR process even though he was an accused party.

And defendants have never disputed that plaintiff was led to believe that he was the decision-maker, including by the Fourth Circuit's chief circuit mediator who stated that the Defender was the decision-maker and no hearing officer would micromanage him. The showing in favor of our due process claim is extremely straightforward and because it's supported by defendant's own sworn declaration. I can give you other examples as well.

For example, the EDR coordinator's declaration states that the Defender was the final decision-maker in the EDR investigation. He determined what -- and I'm quoting this, he determined "Whether the First Assistant had engaged in any misconduct and whether an employment personnel action was necessary to address any findings of misconduct or workplace concerns against the First Assistant." And that's at Paragraph 8 of the EDR

coordinator's declaration.

So there is no dispute here that the Defender was a decision-maker, he appointed the investigator, he made final decisions regarding the investigation, and we were told that he would be the decision-maker in a final hearing. So regardless of whether the Court believes that disputes of fact remain on the equal protection claim, we're entitled to summary judgment in our favor on the due process claim at this point. But I will address the equal protection claim as well.

The Fourth Circuit held that equal protection was violated if defendants were deliberately indifferent to sexual harassment and sex discrimination. Defendants were deliberately indifferent if their response to the harassment and discrimination was clearly unreasonable. Here defendant's response was clearly unreasonable.

It is undisputed that when plaintiff reported harassment under the EDR plan, defendants dragged their feet and failed to take discipline. In fact it was merely a year that was --

THE COURT: Excuse me. Excuse me. Forgive me for interrupting.

MS. STRICKLAND: Yes, your Honor.

THE COURT: It's difficult on these zoom hearings. If we were in a courtroom together, I wouldn't interrupt

so abruptly. And you must forgive me for that.

I understand your argument as to the due process claim and I want to hear Mr. Kolsky's response. But when you get to the equal protection claim, now it sounds like you're making that factual argument, you're saying, "Well just look at this, of course it was unreasonable." Well they deny it and they come up with facts which, at least if credited, would support such a conclusion.

How could I resolve that in your favor on summary judgment?

MS. STRICKLAND: Well, your Honor, because none of the facts here are actually undisputed. The parties may draw different inferences from those facts, but they were legal conclusions that were drawn in a summary judgment motion.

For example, the defendants have admitted -- and this is at Paragraph 317 of the answer, that they did not interview any witnesses, no witnesses in the investigation beside the complainant, the First Assistant, and the Defender. That is undisputed. It is undisputed that they did not take disciplinary action until June 3rd, 2019, almost a full year after the harassment was reported.

And as to the harassment itself, it is undisputed

that disciplinary action was taken under Chapter 9 of the EDR plan for wrongful conduct. "Wrongful conduct" is defined to include harassment, discrimination, retaliation, "wrongful conduct." Defendants themselves took disciplinary actions against the First Assistant and the Defender.

And if you look at the core facts supporting the harassment claim -- for example there is no dispute that the First Assistant sent a quid-pro-quo e-mail entitled "Not now" -- and I can read it to you, but he acknowledged in his text messages that his invitations to meet outside of the office made the plaintiff uncomfortable. All of these things are in the record, they are undisputed, there was disciplinary action taken. We do not have to prove every single fact in our complaint in order to establish that there is no genuine dispute of material fact, and that is the situation that --

THE COURT: I agree, you don't have to prove everything alleged, let's be clear on that, and I think that the Fourth Circuit opinion is clear on that, you don't have to prove everything alleged, and the Court does not view it -- this Court does not view it that way at all, but we're talking about what was reasonable under the circumstances.

Well go ahead, I'll hear you.

MS. STRICKLAND: Yes, your Honor. And if you want to talk about what was clearly unreasonable under the circumstances, I agree, that is absolutely the pertinent question here, and that is part of the reason why the Fourth Circuit took 118 pages to lay out in its decision precisely what the factual allegations were here and what was reasonable or not reasonable, and they found that the allegations --

THE COURT: Well, wait. Wait. Wait. Wait. Wait a minute. I interrupt again.

They didn't find anything, they weren't in a position to find anything. No one has found anything. This was a motion to dismiss. What they did was rule that if you prove certain things, then a remedy potentially will follow. That's the order. That's what an appellate court does, they make rulings. They took your complaint as though it was true. I took your complaint as though it was true, and thought, as I understood the law, there was no remedy. The Court of Appeals reversed, they said "Yes, there is, it's a narrow remedy, but it exists." I fully embrace that.

That's -- now we're engaged -- I'm not finding anything now, that's the issue with summary judgment, I can't find anything. I would have to rule as a matter

of law that this or that fact was either reasonable or unreasonable, and that's a difficult thing to do on this record.

Go ahead, you've got about 5 more minutes.

MS. STRICKLAND: Yes, your Honor.

I understand -- I understand that there are clearly differences between the legal standard on a motion to dismiss and a motion for summary judgment, um, but the facts remain that in order for the nonparty to prevail on summary judgment, they cannot rest on mere allegations or denials, but they must present specific facts showing that contradiction is possible. And not only that, the Court must treat a verified complaint as the equivalent of an opposing affidavit and it must set out the undisputed allegations as true.

Now when the Fourth Circuit was considering our complaint and the detailed allegations in the complaint and stating that as a matter of law these factual allegations gave rise to a valid claim of deliberate indifference, those allegations have been verified under penalty of perjury, and many of those allegations that are pertinent to the deliberate indifference claim are entirely undisputed.

We understand that the First Assistant unsurprisingly denies that he engaged in sexual

harassment. I'm sure every sexual harasser would feel that way. But that's not the pertinent question. The pertinent question is whether there is objective evidence in the record? And we would argue that the fact that the defendants themselves took disciplinary action for wrongful conduct under the EDR plan shows that they understood that this was wrongful conduct under the EDR plan. And there has been no admissible evidence contrary to that showing that has been presented.

We understand that the defendants -- and I can talk about this in rebuttal, but we understand that they are relying on selective hearsay quotations from an investigational court that they won't introduce into evidence, but that's not admissible evidence for purposes of a summary judgment motion, it can't be considered, it's double hearsay.

THE COURT: Why isn't it admissible under 808?

MS. STRICKLAND: Because it's selective hearsay quotations from a document itself that hasn't been admitted. If the public records exception were to apply at all, it would apply to the report. But they have only introduced selective quotations from the report.

THE COURT: I see your point.

MS. STRICKLAND: Yes, yes, exactly. And I would

further just emphasize that that was a touchstone of this rule about the hearsay exceptions is about reliability, it's about ensuring that we don't have unreliable evidence. And their selective quotations of the report clearly show that their representations were unreliable. They left out very clearly material information about how the investigation found that the accused supervisor has poor judgment and decision-making skills, and that is only inadvertently revealed in another filing. And so, no, they can't rely on that, it's not admissible. Rule 56(b) is very clear that evidence must be admissible to be relied upon at the summary judgment stage.

And our argument again, just to quote, because I know I'm running out of time, the due process claim, the pertinent factor, is undisputed, as I have laid out. The Defender was the decision-maker, that is shown by the defendant's own sworn declarations. And as to the equal protection claim, they simply haven't presented any admissible evidence to refute our showing. And so we are entitled to summary judgment on both the due process and the equal protection claims.

THE COURT: Thank you. Thank you.

Mr. Kolsky?

MR. KOLSKY: Thank you. Thank you, your Honor.

Your Honor, I'd first like to address your Honor's comments earlier in the hearing regarding a motion to dismiss and just clarify that.

Although we did file motions to dismiss early in the case, we have not, um, subsequently filed any motion to dismiss. Our summary judgment opposition refers our motions to dismiss -- the fact that it was filed back when our motions to dismiss were still pending. But we're not seeking dismissal. And with that clarification, I'll turn to the summary judgment motion.

Now defendants have not yet moved for summary judgment in this case, only plaintiff has, and that means that for purposes of today's hearing we only have to point to evidence that would be enough to support a verdict in defendants' favor. If we do that, plaintiff's not entitled to summary judgment.

THE COURT: No, I understand that. Don't rise to this business that -- no one thinks that you can get summary judgment. She was concerned about that. That's my usual -- I'll point that out every time the word "summary judgment" comes up here. And I said "under appropriate circumstances." Here my concern is with genuine issues of material fact.

So she did break down her argument in a fairly intelligible way and I would like you to deal with the

due process and equal protection points which she argued.

MR. KOLSKY: Yes, thank you, your Honor.

Now to prevail on plaintiff's due process claim, one thing she must prove is that she was led to believe that the Federal Public Defender would be the final decision-maker in her EDR case, that's from the Fourth Circuit's decision. We have presented evidence that would support a claim in our favor on that element in her claims. In fact the evidence is overwhelming that plaintiff could not reasonably believe that the Federal Defender would be the decision-maker in the EDR process.

The EDR plan itself made clear that the judicial officer, the Chief Judge or designee, resolves the merits of EDR claims and decides upon a remedy. It's in the EDR plan in black and white. And the plaintiff was --

THE COURT: But what about the admissions to which she refers?

MR. KOLSKY: So she's referring to two alleged statements, one by the Judicial Integrity Officer, Jo Langley, and one by the Circuit Mediator, Ed Smith. We do not concede that either of those statements have been made. In fact we submitted a declaration from Ms. Langley disputing that that statement was made.

But in addition to that, we have presented evidence that the plaintiff was specifically told by the Circuit Executive, James Ishida, and also by the Judicial Integrity Officer, Jo Langley, that the judicial officer would be the decision-maker. And again that's what the EDR plan itself says.

So even if plaintiff were told these things by, um, the mediator and by the Judicial Integrity Officer, that doesn't negate this evidence that we've presented. In fact Ms. Strickland said that defendants have never disputed that plaintiff was led to believe the defendant was the decision-maker, and that is simply untrue. We submitted declarations with our supplemental summary judgment brief that directly disputes that and presents evidence. And that's in addition to the terms of the EDR plan itself which makes clear who the decision-maker was.

So there is very much, um -- there's certainly evidence on our side that would support a finding that the plaintiff did not and could not reasonably believe that the Defender would be the decision-maker in her case, it's just contrary to what the EDR plan says, it's contrary to what she was told. And so that evidence is enough to defeat summary judgment on the due process claim.

And turning to the equal protection claim. To prevail on that claim, plaintiff must show first that she was subjected to sexual harassment at the Federal Defender's office. We have presented abundant evidence that plaintiff was not subjected to sexual harassment. In particular --

THE COURT: Do you agree with the Court's -- again you must forgive me because I feel I'm interrupting abruptly and I apologize.

Do you agree with my initial conclusion that if that fact were to be part of your defense, you bear the burden of proof on that, don't you?

MR. KOLSKY: I think that -- the Fourth Circuit defines that as one of the elements of the equal protection claim, that the plaintiff must show she was subjected to sexual harassment. She has to show that.

THE COURT: Well it seems to me that that, um, if she complains about it -- whether or not it happened, she has to complain about it, and then there has to be a constitutionally and statutorily reasonable response. Now if -- part of the defense is it didn't happen or whatever did happen does not constitute wrongful harassment, um, my initial reaction is you bear the burden of proof on that. But I don't know as we have to decide that today, you have submitted evidence.

Go ahead.

MR. KOLSKY: Yeah, and I would just direct your Honor to Page 359 of the Fourth Circuit's opinion where they list the elements. They say "The elements of such a claim we conclude are essentially identical to those outlined by the Fourth Circuit in ***Feminist Majority Foundation*** and the first element is the plaintiff was subjected to sexual harassment by another employee. So we do think that's part of her case that she has to prove.

THE COURT: Thank you.

MR. KOLSKY: We have submitted a very detailed declaration by the First Assistant, the supposed harasser, responding to plaintiff's allegations about him, and he vigorously denied that he sexually harassed the plaintiff.

The incidents that plaintiff complains of are not inherently sexual in nature or inherently harassing, um, offering plaintiff a ride home when it was rainy out, the plaintiff was sent a letter by phone asking the plaintiff to attend management lunches, criticizing her for campaign client obligations. The plaintiff wants the Court to interpret these as being acts of sexual harassment, but that would conflict with the First Assistant's declaration which forcefully rejected the

allegations that he engaged in sexual harassment.

Ms. Strickland mentioned "inferences." Well at summary judgment inferences go in favor of the non-moving party. So inferences are drawn in the defendant's favor. Plaintiff's subjective belief that she was harassed does not entitle her to summary judgment.

In addition to proving that she was subjected to sexual harassment, plaintiff also must prove that defendants were deliberately indifferent to her claims of harassment. But again they didn't present evidence to support a finding that defendants were not deliberately indifferent.

The facts are when plaintiff reported the alleged harassment to the Defender, he promptly informed the circuit executives, that same day the Chief Judge ordered an investigation and investigators were selected, and plaintiff was allowed to telework during the investigation, so she was not in contact with the First Assistant. Far from the decision of deliberate indifference, defendants' actions showed they took the plaintiff's claim seriously and responded promptly.

Plaintiff relies on the decision in ***Feminist Majority Foundation,*** but that case was in the context of a motion to dismiss, not summary judgment, and there the

allegation was that the defendants took little or no action in response to ongoing harassment and threats against the plaintiff. That's not the situation we have here.

Here plaintiff's deliberate indifference claim is that defendants failed to take action in response to alleged harassment. It is undisputed that defendants took action. It is undisputed that defendants initiated an investigation and ensured the plaintiff did not have contact with the First Assistant while that investigation was pending.

Now to be sure the plaintiff has certain criticisms of the investigation including that in her opinion it took too long, that in her opinion the investigator didn't do an adequate investigation, and the plaintiff certainly disagrees with the investigation's findings, which do not support a claim. But none of that shows deliberate indifference.

And not only does plaintiff have to prove deliberate indifference, she also has to prove that any deliberate indifference was motivated by discriminatory intent. We have presented evidence that the actions in response to plaintiff's claims of sexual harassment were undertaken in good faith and not for the purpose of discrimination, harassment, or retaliation, and that was

suggested in several of the declarations we submitted. And that alone precludes granting summary judgment on the equal protection claim. As best I can tell, the issue of discriminatory intent has not been addressed in any of the several briefs that plaintiff filed with the Court.

And I want to respond to the point that Ms. Strickland made a couple of times, she said that disciplinary action was taken for wrongful conduct. That's simply untrue. There was counseling. There was no evidence in the record, nothing to support the conclusion that there was any wrongful conduct determination, in fact there was not.

THE COURT: She says that I can draw an inference that that is just, um, in fact it's discipline but under another name, that's what she's arguing.

MR. KOLSKY: Well honestly I understand her argument, she's saying that, um, the fact that there was counseling means there must have been, um, a finding of wrongful conduct under the EDR plan. But we've submitted the findings from the investigation which showed there wasn't a finding of wrongful conduct. So plaintiffs put that in issue and it is -- um, complaining that we're responding by indicating what the findings of the investigation were.

Now lastly, the plaintiff argued in her motion that summary judgment should be granted because defendants allegedly failed to participate in discovery. I don't believe this argument merits much of a response, we've refuted it several times previously, but I'll just note a few things.

We filed motions to dismiss early in the case. The local rules specifically say discovery does not begin while motions to dismiss are pending. Nevertheless plaintiffs proceeded to serve voluminous discovery on defendants without first seeking legal course to conduct early discovery. We objected and said it was rather premature and we filed a motion to confirm that we didn't have an obligation to respond to her request at that point. The Court granted that motion. So there's no merit whatsoever to plaintiff's repeated assertion that defendants somehow failed to participate in discovery. And for all these reasons the Court should deny the plaintiff's motion.

Thank you.

THE COURT: All right.

Well having heard the parties and carefully reviewed the record, the motion for partial summary judgment is denied.

We'll take up the motion for a prompt evidentiary

hearing. And I read both the motion and the defendants' response and I appreciate both.

And, Mr. Andonian, you're going to speak to this?

MR. ANDONIAN: Yes, your Honor.

THE COURT: All right.

MS. STRICKLAND: Your Honor, may I be heard on one other matter regarding the summary judgment motion?

THE COURT: No, there's no rebuttal, ma'am.

MS. STRICKLAND: It's not rebuttal.

THE COURT: I said 15 minutes a side.

All right.

MS. STRICKLAND: It's not for rebuttal.

THE COURT: I beg your pardon?

MS. STRICKLAND: We would request that under Rule 56(a) the Court state the reasons on the record for denying the motion for partial summary judgment.

THE COURT: Yes, and you're entitled to that. Because in the Court's view, having reviewed the entire record carefully, there exist genuine issues of material fact as to each essential element that the plaintiff must prove. Therefore the motion is denied.

All right.

Mr. Andonian, um, I think the Fourth Circuit understands exactly what I'm trying in fairness to do here, so I'm not going to decouple my already-made

ruling that consideration of a preliminary injunction will be combined with trial on the merits. No one is hamstrung, no one is denied either discovery or the production of evidence at trial. Indeed having looked over this evidentiary record in detail now, it seems to me that the plaintiff, um, herself is in possession of virtually all of the evidence necessary for the liability case, and as Mr. Kolsky has described with his various statements, the government is in possession of the evidence that it will seek to rebut that evidence.

There may be something to expert testimony with respect to a front-pay determination if we get to that point, but the Court is open to a prompt evidentiary hearing as to liability and then once the Court determines liability, if we're going to further explore damages, to set a later date for the exploration of damages or some other remedy. But I'm only going to do it once.

Your motion for a prompt evidentiary hearing, which Ms. Gersen is the lead person who signs that, makes very clear that what you want is a hearing and then you can appeal that and then we'll have the trial. That's not helpful. It does not, as Rule 1 requires, "tend towards the just, speedy, and inexpensive resolution of the case." The case does present

important public -- matters of public interest. I'm simply trying to get it in a posture where factual findings can be made. We don't have findings yet.

So, Mr. Andonian, when do you want your evidentiary hearing, which in fact is at a minimum -- I've got to hear what the government says, but at a minimum it's going to be trial as to liability.

MR. ANDONIAN: Your Honor --

MS. STRICKLAND: Your Honor, just very quickly again just because what you just said about discovery relates to the summary judgment motion, and then I promise I'll turn it over to Mr. Andonian.

THE COURT: Now look, ma'am, I'll hear you, but we're not going to just jump back and forth like this, I understood he was going to argue that.

MS. STRICKLAND: Yes, your Honor, but --

THE COURT: I denied the summary judgment motion.

MS. STRICKLAND: I know that.

THE COURT: Now if you have something to say about scheduling, I'll hear you.

MS. STRICKLAND: Yes, your Honor, this is related to scheduling.

Because you have stated that genuine issues of fact exist as to each essential element, we are going to need summary discovery. I just thought you just said

that there isn't any discovery --

THE COURT: Let me explain this to you about discovery. Wait. Wait. Only one of us can talk. And respectfully you're going to have to listen to me.

I haven't foreclosed any discovery. I haven't foreclosed subpoenas to bring people before the Court to testify. But this idea that we're going to have a round of depositions so that every possible person is going to be deposed and then we will have the trial, there is no requirement due process or otherwise for that. I am offering a prompt trial.

Now in the real world the earliest I can get to it probably is in December. But as -- in December I will give you the time necessary to put on your case and the government the time necessary to put on its case just as promptly as the Court has trial days. All I'm asking is when do you want it? And when I hear that, I'll hear from the government and hear when they want it.

This motion has made various statements about the government withholding discovery. Well I haven't heard that from Mr. Kolsky and I'm not going to be very happy about anyone withholding discovery.

So I'll hear from you or Mr. Andonian, but not both.

Who's going to talk?

MR. ANDONIAN: Your Honor, if I could? And I'm coming into this, you know, after some work has been done so forgive me if I'm retreading a little bit of ground. But what I do think is important are a couple of points.

The first is, um, just to piggyback on what Ms. Strickland said, there is a need for discovery. As in any case, we don't know what we don't know until we take discovery. I don't understand the government to be denying that and disputing that and in fact --

THE COURT: I'm not saying they are, you give me a date. When do you want this hearing?

MR. ANDONIAN: We want this hearing that's pretrial and is not --

THE COURT: Well that's not going to happen. I've already ruled on that.

MR. ANDONIAN: If I could just ask, your Honor? I guess I'm confused as to what -- what the problem with having a pretrial hearing is as opposed to the consolidated trial? With all due respect, I've litigated plenty of these and I'm not sure I've ever had a consolidated trial.

Rule 65 itself allows the testimony to be incorporated into the trial record. So this idea that there would be duplication or undue burden, I guess I'm

missing, because it's not like we're going to have Part 1 and then Part 2 be an exact carbon copy of Part 1. We would do Part 1 and get to Part 2 when the trial date rolls around.

I would note just for -- um, illustratively, the preliminary injunction motion or the hearing that we're asking for pretrial of that we think would take about a day with a few witnesses. The trial, by comparison, is at least a week with multiple witnesses and more issues than what we would cover in the PI hearing. So they're not a carbon copy. And to the extent that --

THE COURT: I don't understand. I don't understand. If we -- I don't see how you can do this in a day if you're going to --

Do you think there's some sort of different standard between a reasonable likelihood of success and a fair preponderance of the evidence?

MR. ANDONIAN: No, I think it's a different presentation, it's a different presentation between the two events. And you know frankly, your Honor, what we come forward with and what we present is what we would have to live with. We believe the preliminary injunction hearing looks different than the full-blown trial, and we --

THE COURT: Also, respectfully, I've litigated a

number of them too and this procedure, um, so long as I give both sides their full chance to present their evidence does achieve the goal -- the primary goal of a just, speedy, and inexpensive resolution.

When you say you've got to have something for your week-long trial -- and I think that's about right, a week is about right to try this case. What is it that you want to be ready for a week-long trial that you could not have if we started the trial in December or January?

MR. ANDONIAN: Well I don't -- I think that's kind of the point that we're trying to make, is that we don't know. The purpose of discovery is to discover information that could be relevant and helpful in preparing for a trial in the case.

THE COURT: But that it could be -- you know this case has been pending for some years, it's already traveled to the Circuit and back. At least looking at this evidentiary record -- and there is an evidentiary record now, it's a rather fulsome evidentiary record. Who do you want to hear from that hasn't been mentioned in this evidentiary record?

MR. ANDONIAN: Well, your Honor, I think, um, again to go back to your ruling just a minute ago, and as you've stated, there are open questions of fact now.

And again I want to emphasize, based on the government's filing this morning, that I don't understand the government to be disputing any of this, that there is a need for discovery, that there are open questions that --

THE COURT: The Court has a responsibility itself. Let me ask you this.

Are you okay with the government's proposal? The government proposes a trial in late spring.

MR. ANDONIAN: I know, I'm not sure, we just got that this morning when you did. There was an effort to discuss that with us ahead of time. But I can tell you right off the bat, off the tip of my tongue, that I'm scheduled to be in trial in Texas in June, so I'm not sure frankly that that would be all right.

THE COURT: But you see this is precisely -- and I really respect you, sir, and you're talking my language. I -- I believe that the best way we could reach out for justice for all parties -- and I haven't heard from Mr. Kolsky yet, but I'll hear from him, is if we really pay attention to what the evidence is in this case and we lay that evidence out -- and I mean it's going to be before me in a full and fair presentation, and I do my level-best to make findings of fact, and then whoever disputes that, then we are on to the Court of Appeals

and I am happy with that. But I'm simply asking for some reasonable proposal.

Telling me you're going to put it on for a day and then now -- and of course you have the right, I'm not foreclosing the right, but if I did that, then you're on to the Court of Appeals with respect to that. I don't propose to do it twice. I propose to get all the evidence that is necessary to make difficult, difficult factual determinations here. That's all. And I propose to do it in a reasonable way.

So, um, now your last chance. Give some date where we could begin to have this hearing?

Now I am persuaded of one thing. If we go along in the hearing and I come to a belief at the end of the liability hearing that an immediate injunctive remedy is required, I won't hesitate to grant it. And I've already laid myself open to saying that liability is one thing and prospective relief is another and so maybe we can put the prospective relief off further. But I don't really, um, and looking at this record, see what we're waiting so long for? I can't get you till December, get to you till December, and I'm trying to -- well let me go to the government while you think about it.

Mr. Kolsky, they haven't had a chance really to digest your proposal. Your proposal is fine by me,

although I would move more quickly than that. And, um, further I would say, um, in their motion for a prompt evidentiary hearing, they cast dispersions about various productions by the government. I extended your production once, but I'm not about to extend any delays in discovery, this is a case that has to be on the front burner by everybody, um, the Court has so ordered. And so if they went for your proposal, I'd go for your proposal.

What about a proposal, Mr. Kolsky, that gets us to trial at about, um, in March, how do you feel about that?

MR. KOLSKY: Um, your Honor, this is Josh Kolsky, I called in by phone. I apologize, I somehow lost my video connection so I missed the last few minutes. But I did hear your Honor's question.

You know we've tried to come up with a proposal that, you know, we think is reasonable and is a good compromise and it will allow this matter to be resolved, you know, relatively quickly, and so our proposal would be for a trial in June.

THE COURT: I've read it, I know what it says. Now I'm saying how about taking roughly that same schedule but trying it in March?

MR. KOLSKY: Um, I think it's going to be

difficult to get through discovery and --

THE COURT: Why don't we try -- and this is what I was talking to Mr. Andonian about. If all we're trying is liability, then why?

MR. KOLSKY: There are -- we are in the process of reviewing documents so that we can produce documents. This case involves a significant amount of electronic discovery. We received 60 document requests from plaintiff. So there's just a lot of information to go through.

THE COURT: Well you know with respect, and I do say this with respect, this is the government of the United States, you could do it if you turn-two. That's just a standard objection.

We'll go back to Mr. Andonian. Mr. Andonian, what do you say, how about trial in March of liability only?

MR. ANDONIAN: Well you've asked for a proposal, I'm trying to give you one. I guess I'll say it like this. I'll piggyback off Mr. Kolsky.

THE COURT: All right.

MR. ANDONIAN: Merely again, as I've been saying, I don't think there's disagreement between the parties that discovery is necessary and that it's going to take some time. We have a trial date currently set in September which allows for a regular discovery process

like in any other case, which I think would be beneficial here, I think the government thinks it would be beneficial here, and it would be in fact beneficial. The proposal is to simply have a pretrial preliminary injunction hearing and --

THE COURT: Mr. Andonian, um, I am not denying a preliminary injunction because I see that's your grounds for saying I am not giving you the attention that you're entitled, I have consolidated the two. I am prepared to go forward as early as November.

MR. ANDONIAN: Your Honor, I --

THE COURT: I have a double trial, but I am prepared to go forward as early as November and certainly trial days in December. So your answer is -- you're only saying what you already said.

MR. ANDONIAN: Your Honor, we are not prepared to go forward with a trial on the merits without discovery, and again I --

THE COURT: Again no one says you'll be without discovery.

MR. ANDONIAN: Your Honor --

THE COURT: You don't understand. Subpoenas work. Bring in the people. If that's inefficient --

MR. ANDONIAN: Your Honor, what I've been --

THE COURT: If you think that's inefficient, the

inefficiency falls on the Court as well. I'll be there. I can make rulings as to what's relevant and what isn't. I will decide.

All right, here's the Court's order. You're to sit down and in a week's time you're to give me a joint proposal as to a -- I maintain my view -- not view, I maintain the order that the case will go forward with trial on the merits. You see if you can't agree as to when that trial on the merits will commence, though I am amenable to bifurcating liability and remedy.

One week from today I want a joint proposal. If I don't get a joint proposal, you give me your separate proposals and I will enter an order thereon.

Are there any questions?

MR. ANDONIAN: Your Honor, I just want to note for the record that it's over our objection or continuing objection that the --

THE COURT: Noted, your rights are certainly saved, sir.

All right. I do thank you, I do appreciate the argument, and I appreciate the briefing on the motion for partial summary judgment on both sides, it is a very good primer as to the evidence that we will be dealing with at trial.

We'll stand in recess.

(Ends 4:00 p.m.)

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the foregoing record is a true and accurate transcription of my stenographic notes before Judge William G. Young, on Monday, October 31, 2022, to the best of my skill and ability.

/s/ Richard H. Romanow 11-8-22
_____
RICHARD H. ROMANOW Date